Supreme Court, U.S.
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No. 96-1962

In The

Supreme Court of the United States

October Term, 1997

SYLVIA COHEN,

Petitioner,

vs.

LITTLE SIX, INC., a foreign corporation, d/b/a Mystic Lake Casino,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY THE PETITION

1. Did Congress confer sovereign immunity on Indian tribes?

   This question was not addressed below.

2. If so, is such conferral subject to strict constitutional scrutiny under *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995)?

   This question was not addressed below.

3. Does recognition by the Minnesota Supreme Court that state courts do not have subject matter jurisdiction over a tort claim, where the defendant is a wholly-owned enterprise of a sovereign Indian tribe, constitute state action for purposes of equal protection analysis?

   This question was not addressed below.

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STATEMENT OF THE CASE

Petitioner brought suit in Minnesota state district court, alleging that various injuries resulted from a visit to Mystic Lake Casino, owned and operated by Respondent, Little Six, Inc. ("LSI"). LSI is a corporation wholly-owned by the Shakopee Mdewakanton Sioux (Dakota) Community, a federally-recognized Indian tribe (the "Tribe"), and is the instrumentality through which the Tribe operates its lawful gaming activities pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*

The trial court dismissed the complaint for lack of subject matter jurisdiction, based on LSI's sovereign immunity from suit. The Minnesota Court of Appeals affirmed the trial court's dismissal, holding as well that Minnesota courts lacked subject matter jurisdiction over a claim arising entirely within Indian country, and involving an Indian tribe or instrumentality of a tribe. The Minnesota Supreme Court, in turn, summarily affirmed the Court of Appeals decision, relying on its opinion in *Gavle v. Little Six, Inc., et al.*, 555 N.W.2d 284 (Minn. 1996), *petition for cert. pending* (No. 96-1215, docketed Jan. 30, 1997). (Petition A-78).

ARGUMENT

The Petition is nothing more than a house built on sand. It is based on the astounding assertion that "[t]ribal sovereign immunity exists by virtue of Congressional action . . . ," (Petition 19), and is predicated on the false assumption that Congress is the source of tribal sovereignty. Petitioner implies that sovereign immunity is a

federal affirmative action program, and should therefore be subject to strict scrutiny under the United States Constitution, as are other race-based federal programs. *Id.* at 8, *citing Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). Disregarding the fact that this argument was not addressed below, the Petition must be rejected, for tribal sovereignty is *inherent* and does not exist by virtue of congressional action. Nor was tribal sovereign immunity created by a federal statutory scheme. The purported conflict between *Adarand* and *Morton v. Mancari*, 417 U.S. 535 (1974) (which Petitioner urges as the primary basis for grant of the Writ) does not exist. There is no state action at issue here to result in a denial of equal protection, nor is there a conflict among the courts respecting the issues urged as basis for granting the writ. When Petitioner's arguments are examined in light of 150 years of sound judicial precedent concerning Indian tribal sovereignty, it is clear that the Petition must be denied.

I. REVIEW OF THE QUESTIONS PRESENTED BY THE PETITION IS NOT APPROPRIATE AT THIS TIME, AS THEY WERE NOT PROPERLY ASSERTED BELOW AND THE MINNESOTA SUPREME COURT DID NOT PASS ON THE ISSUES.

Petitioner is appealing the Minnesota Supreme Court's summary affirmance of the Minnesota Court of Appeals' affirmance of the trial court's dismissal of the cause for lack of subject matter jurisdiction. *See* Minnesota Supreme Court Order (Petition A-2); Minnesota

Court of Appeals Opinion (Petition A-3); Trial Court's Order and Judgment (App. 1).[1] The trial court based its dismissal on its recognition of the fact that LSI shares the Tribe's immunity from unconsented suit, and that neither the Tribe nor LSI had waived, nor had Congress abrogated that immunity. (App. 10).

There was only one federal constitutional issue raised in the trial court and the Court of Appeals. Petitioner argued that dismissal would relegate the claim to tribal court, which Petitioner asserted is *necessarily* a

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[1] Yet, astonishingly, Petitioner still asserts that it "prevail[ed] in the courts below on subject matter jurisdiction." Petition 7 n.1, *citing* the decision of the Minnesota Supreme Court in *Gavle*. Contrary to Petitioner's assertion that *Gavle* overrules the Court of Appeals in this case on the issue of subject matter jurisdiction of Minnesota courts over a claim against a tribe or instrumentality of a tribe where the cause of action arose entirely within Indian country, *Gavle* left the issue open. All matters in issue here occurred in Indian country, and it is clear from a careful reading of *Gavle* that Minnesota courts would not have subject matter jurisdiction over this suit even if sovereign immunity were never asserted. Such jurisdiction would clearly lie with the Tribal Court, as determined by the Court of Appeals. *Cohen*, 543 N.W.2d at 381, *citing Williams v. Lee*, 358 U.S. 217 (1959) (Petition A-10-12). If it were true that Petitioner *had* prevailed on the issue of subject matter jurisdiction in the courts below, then this Petition would never have been filed.

violation of the federal guarantee of due process of law. *See* Minn. Ct. of Appeals Opinion (Petition A-13).[2] In order to further the due process argument, Petitioner also insinuated that the court's recognition of sovereign immunity would amount to state action for purposes of the due process analysis. The trial court did not even find it necessary to address these specious arguments. *See* Trial Court's Order and Judgment (App. 1).

After the trial court granted LSI's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Petitioner appealed her due process claim to the Minnesota Court of Appeals. As defined by Petitioner:

> The issues raised on appeal will include the following: (1) Whether Congress' codification of the Indian Gaming Regulatory Act, coupled with the Tribal-State Compacts between the Shakopee Mdewakanton Dakota Sioux Community [sic] and the Certificate of Authority to Transact Business in the State of Minnesota under Minn. Stat. § 303.01, acts as a clear waiver of sovereign immunity, with respect to requirements of the Indian Gaming Regulatory Act,

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[2] Petitioner states that constitutional due process is violated where exclusive or primary jurisdiction is in tribal courts, asserting such courts lack "judicial independence and adequate procedures." Petition 7 n.1, *citing* the dissenting opinion in *Cohen*. It bears noting that there was *absolutely nothing* of record to support the dissent's diatribe regarding tribal courts. Given the dissent's obvious disregard for that fundamental tenet of American jurisprudence – a decision by a court *must be based on the record* – it is small wonder that the Minnesota Supreme Court declined to respond to Petitioner's due process claims, when those claims relied upon the dissent's opinion for support.

> specifically, the Respondent's duty to construct, operate and maintain it's [sic] facility to insure the public' [sic] health and safety; and (2) Whether sovereign immunity in this suit violates Appellant's guarantees of substantive due process under the United States Constitution.

Notice of Appeal to Court of Appeals at ¶ 5 (App. 14).

At this point, Petitioner had not raised even a hint of the current argument that sovereign immunity is a federal program subject to strict scrutiny under equal protection analysis. The Court of Appeals promptly affirmed the trial court's dismissal, holding that, not only had LSI not waived its sovereign immunity from suit, but Minnesota courts lack subject matter jurisdiction in the first instance to hear claims against LSI arising from acts occurring entirely in Indian country, and that such claims must be brought in tribal court. *See Cohen*, 543 N.W.2d 376 (Minn.App. 1996) (Petition A-10-12). The Court of Appeals also promptly disposed of Petitioner's due process argument, holding that the Petitioner had "not been deprived of her day in court, but only of her day *in the court of her choice*." (*Id.* A-13, emphasis in the original). No doubt inspired by the aberrant dissenting opinion in the Court of Appeals (*Id.* A-14),[3] Petitioner proposed the new

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[3] It can hardly be said with any certainty that the Court of Appeals dissent raised the present issues *sua sponte*, but it can hardly be said that it did not. Judge Randall's sprawling opinion (63 pages) covered topics as diverse as World War II-era Japanese interment camps (Petition at A-58) and the Pledge of Allegiance (Petition at A-61), and relied extensively on matters not of record in the proceedings, but had relatively little to do with the actual issues at hand.

equal protection argument for the first time in the Minnesota Supreme Court. *See* Petition for Review of Decision of Court of Appeals (App. 23).

Although the Minnesota Supreme Court granted review, it took no notice of this new claim, relying instead on its opinion in *Gavle*. (Petition A-78). In *Gavle*, the Court held that LSI shared the Tribe's immunity (*Id.* A-102), and had not waived it (*Id.* A-106) – the very basis for the trial court's dismissal in the present case. It was unnecessary, then, to restate in this case what had been held in *Gavle*. Petitioner's due process claims were given no credence, and the court declined to address the new equal protection claim (even after Petitioner's Motion for Rehearing, App. 16).

"When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (internal citations omitted). It is not appropriate for the Court to pass on questions not properly presented to the Minnesota Supreme Court. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992); *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988). Nor is it appropriate for this Court to review questions not addressed below. *See Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Pope v. Illinois*, 481 U.S. 497, 504 (1987).

There may be some doubt as to whether failure to present issues before the state courts, or failure of the

Minnesota Supreme Court to address the issues, establishes a *jurisdictional* bar to this Court's review. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) ("Whether appellant's failure to raise these claims in the [state] courts deprives us of all power to review them under our certiorari jurisdiction is an unsettled question."). But, regardless of whether the bar to review is jurisdictional or merely prudential, the Court should decline to hear Petitioner's new claims at this time.

II. TRIBES EXERCISE INHERENT POWERS OF A LIMITED SOVEREIGNTY WHICH HAS NEVER BEEN EXTINGUISHED.

Even if the issues had been properly presented, they are fundamentally flawed. The sovereign status of Indian tribes has been recognized since the earliest recorded interactions between Europeans and Indian people. As early as 1557 tribal sovereignty was acknowledged as the basis for treaties between Europeans and the original inhabitants of the lands presently contained within the borders of the United States. *See* F. Victoria, *De Indis et de Jure Belli Relictiones* 128 (J. Bate transl. 1917) (orig. ed. 1557); F. Cohen, *Handbook of Federal Indian Law* 52-55 (1982 ed.). As indigenous people with powers of self-government, the United States was compelled to treat with the Indians, and to establish government-to-government relationships with Indian tribes. This Court acknowledged the sovereign status of Indian tribes as early as 1823, *see Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 593-94 (1823), and Supreme Court precedent from that day to this has consistently reaffirmed that Indian tribes are sovereign. *See Idaho v. Coeur d'Alene Tribe*, No.

94-1474 (issued June 23, 1997) (recognizing that "the plan of the [constitutional] convention did not surrender Indian tribes' immunity for the benefit of the States").

The present right of tribes to govern their territories and the persons within them flows from this preexisting sovereignty, a sovereignty that pre-dates the United States Constitution, as was fully recognized by the Supreme Court in *Cherokee Nation v. Georgia*, 8 L.Ed. 25 (1831). The status of Indian tribes in the law is unique, for they are "domestic dependant nations." *Id.* The sovereignty of Indian tribes was not delegated by the federal government, *United States v. Wheeler*, 435 U.S. 313, 328 (1978), created by the United States Constitution, or granted by any federal act, for the powers of Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished." *Id.* at 322, *citing* F. Cohen, *Handbook of Federal Indian Law*, at 122 (1945 ed.).

Central to the discussion of Petitioner's claims is the fundamental proposition that Indian tribes function as "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S. (6 Pet) 515, 559 (1832); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Petitioner seeks to have this Court treat Indian tribes as little more than private voluntary organizations, a proposition long rejected by this Court. *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976) (holding that states are without civil regulatory jurisdiction over Indian tribes, and stating that the Supreme Court long ago rejected the idea that Indian tribes are little more than "private, voluntary organizations"), *citing United States v. Mazurie*, 419 U.S. 544, 557 (1975). It is their

inherent sovereignty which permits Indian tribes to exercise powers of self-government over their territories and the persons within them, *Mazurie*, and it is the original natural rights of Indian tribes, including powers of self-government and the right to function immune from suit, to which Petitioner is truly opposed.[4]

In addition to ignoring the fact that Indian tribes are governments, not simply groups of individuals, Petitioner ignores the distinction between *inherent* sovereignty and the exercise of powers delegated from the federal government. Although the exercise of powers of self-government in the sphere of civil jurisdiction may be subject to Congress' plenary oversight, *see, e.g.*, 25 U.S.C.

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[4] Tribal sovereignty has been recognized in a variety of contexts, which include, but are not limited to: the right of Indian tribes to conduct gaming on reservation lands, *California v. Cabazon Band of Mission Indians et al.*, 480 U.S. 202 (1987) (holding state and local gaming regulations not applicable on tribe's reservation, and that Indian tribe had inherent sovereign authority to engage in gaming activity); the jurisdiction of a tribal court over causes of action arising in Indian country, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (finding that federal district court must abstain from hearing an action where there exists a tribal forum with a colorable claim to jurisdiction); tribal taxing authority, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding tribal severance tax on oil and gas leases of non-Indians was valid exercise of inherent tribal sovereignty); tribal hunting and fishing regulation, *New Mexico v. Mescalaro Apache Tribe*, 462 U.S. 324 (1983) (holding tribal code regulating non-Indian hunting and fishing on reservation lands was valid exercise of inherent sovereign authority); and tribal health regulation, *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981), *cert. denied*, 496 U.S. 967 (1982) (holding application of tribal health regulations to non-Indians on fee lands within the reservation a valid exercise of inherent tribal sovereign authority).

§ 476 [Indian Reorganization Act]; 25 U.S.C. § 1302 [Indian Civil Rights Act], such oversight did not create the Indians' power to govern themselves; it merely reflects Congress' recognition of inherent tribal sovereignty. The exercise of tribal powers of self-government does not require congressional action, for tribal powers of self-government exist at law already, *Wheeler*, 435 U.S. at 315; *see also National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854-855 (1985), and are retained to the extent "not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 197 (1978); *see also* 55 Interior Dec. 14 (1934).[5]

Petitioner cites no treaty, statute or withdrawal by implication of the Tribe's sovereign status that would warrant the conclusion that the Tribe exists, or has authority to assert its powers of self-government only by virtue of affirmative Congressional action. Clearly, Indian tribes have not given up their inherent sovereignty wholesale, *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Wheeler*, 435 U.S. at 323, nor has the Tribe ceded *its* inherent sovereignty, as evidenced by continued recognition by the federal government. *See, e.g., Prescott, et al. v. Little Six, Inc.*, 897 F. Supp. 1217, 1220 (D. Minn. 1995).

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[5] Those attributes of sovereignty withdrawn by treaty or statutes are the authority to determine relations with foreign governments and the authority to freely alienate tribal lands. *Wheeler*, 435 U.S. at 323. The attribute withdrawn by implication as a necessary result of the dependant status of tribes is the authority to exercise criminal jurisdiction over non-members of the tribe. *Oliphant*, 435 U.S. at 197. None of these attributes is in issue here.

Because Petitioner's entire argument rests on the proposition that Indian tribal sovereignty is created by congressional act, and because this underlying premise is patently false, the Court should deny the Petition.

III. TRIBAL SOVEREIGN IMMUNITY DOES NOT EXIST "BY VIRTUE OF CONGRESSIONAL ACTION."

In an effort to lend credence to the argument that sovereign immunity is the equivalent of a federal affirmative action program, amenable to analysis under the reasoning of this Court in *Adarand*, Petitioner makes the outrageous claim that "Tribal sovereign immunity exists by virtue of Congressional action . . . ," (Petition 19), and cites *Rice v. Rehner*, 463 U.S. 713, 719 (1983); *Santa Clara Pueblo*, 436 U.S. at 58; and *Wheeler*, 435 U.S. at 313, for support. This is a blatant misstatement of the holdings of these cases. None of them expressly states, or even remotely begins to imply, that sovereign immunity is nothing more than a "federal benefit." (Petition 9). To the contrary, each cited case, *at the page identified by Petitioner*, states that the sovereign powers of Indian tribes are *inherent*, and are retained to the extent not divested by an exercise of Congress' plenary power over Indian tribes.

Petitioner further states, entirely without support from either decisional or statutory law, that "Congress, in an exercise of its plenary power, has established a *statutory scheme* permitting Indian tribes, and no other group, to assert sovereign immunity as a defense in all civil

cases." (Petition 19, emphasis added). Yet, incredibly, Petitioner fails to cite to the law creating this purported "statutory scheme". Considering that congressional action is absolutely essential to Petitioner's "strict scrutiny" argument, and in light of the fact that the purported statute would constitute the only evidence of such congressional action sufficient for this Court to apply "strict scrutiny" to any aspect of this case, Petitioner's failure to cite the purported statute should settle the matter for this Court.[6] If such a statute exists, then perhaps Petitioner's arguments would warrant some consideration; absent such a statute, they warrant none.[7]

To state that Indian tribes are sovereign is, therefore, a truism. That Indian tribal sovereignty is inherent, and was not created by Congressional action is one of the bedrock legal principles in the area of federal Indian jurisprudence. *See* discussion *infra.* at II. Further, to state that "dependent as well as dominant sovereigns" are

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[6] It is a violation of the rules governing practice before this Court for Petitioner's counsel to mislead the Court. Petitioner's counsel has stated as fact that there is a statutory scheme, established by Congress, permitting Indian tribes to assert sovereign immunity from suit, when clearly there is none. Rule 11 requires candor toward the tribunal, and prohibits a lawyer from knowingly making a misleading legal argument to the tribunal. F.R.C.P. 11; *see also* ABA Model Rules of Conduct 3.3(a)(i); MN.R.C.P. 3.1(a)(3).

[7] Petitioner's apparent concern for the rights of Indian tribes (Petition 17-19), and her desire to protect Indians and tribes from racially-motivated congressional action is truly moving; however, LSI would remind the Court that Petitioner is in no position to assert the rights of Indian tribes as a basis for grant of the Petition, given that she is litigating against one.

exempt from suit without consent, and that the immunity was *"theirs as sovereigns"*, as this Court did in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), simply confirms the inherent nature of tribal sovereignty. The Tribe is entitled to all the benefits of its sovereign status, including the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58 (internal cites omitted).

While tribal immunity from unconsented suit is not created by congressional action, congressional action *is* required to waive such immunity. *U.S. F & G.*, at 514 (stating that the sovereign right of immunity from suit could be waived only by congressional action).[8] Congress has not acted to waive the Shakopee Community or LSI's sovereign immunity from suit.

Petitioner's argument is predicated on acceptance by the Court of the proposition that sovereign immunity is the result of a statute enacted by Congress. Because this proposition is entirely false and patently misleading, and because tribal sovereign immunity is an incident of inherent tribal sovereignty, *not* the result of congressional

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[8] LSI would note that an Indian tribe may also waive its immunity from unconsented suit. *See Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165 (1977) (*Puyallup III*) (holding that waiver of sovereign immunity from suit must be unequivocally expressed by Congress or the tribe); *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991) (finding that only tribe or Congress can waive tribe's sovereign immunity from suit). But, given that Petitioner's argument addresses only congressional action, and that she has not asserted LSI waived its immunity from suit, LSI refrains from further discussion regarding tribal waivers of immunity.

action, Petitioner's argument must fail. Given that it is congressional *inaction* to which Petitioner truly objects, and because without congressional action, there is nothing to which this Court can apply strict scrutiny, Petitioner's argument should be rejected. The sand upon which Petitioner has constructed the house of her argument has been washed away by the tide of sound judicial precedent; that house has fallen. The Petition should be denied.

IV. EVEN IF TRIBAL SOVEREIGN IMMUNITY WERE NOTHING MORE THAN A FEDERAL AFFIRMATIVE ACTION PROGRAM, THE SOUND REASONING OF THIS COURT IN *MORTON* WOULD CONTROL, AND DOES NOT CONFLICT WITH *ADARAND*.

Even if the insupportable assumptions upon which the Petition is based were true – that tribal sovereignty is federally delegated, and that tribal sovereign immunity is a federal affirmative action program – this Court disposed of Petitioner's arguments twenty-three years ago, in *Morton*. Specifically, the Court held that, as long as federal preferences for Indians are reasonable and rationally designed to further Indian self-government, such preferences will not violate the United States Constitution. 417 U.S. at 555.[9]

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[9] Even if Petitioner were to argue that adopting a constitution under provisions of the Indian Reorganization Act, 25 U.S.C. § 476, constitutes federal action creating a race based preference, such argument could not pass muster. "While the exercise of powers under these constitutions was expressly

Petitioner argues that because sovereign immunity is created by congressional action, it requires strict judicial scrutiny, and that *Morton* is in conflict with *Adarand* because *Morton* imposes only a rational-basis test, and purportedly supports race-based preference. Notwithstanding Petitioner's treatment of tribal sovereign immunity as a mere delegation of federal authority, this argument is contrary to this Court's precedent and most every authority on the subject. As this Court recognized in upholding the constitutional validity of Section 12 of the Indian Reorganization Act, 25 U.S.C. § 476, *et seq.*, "this preference does not constitute 'racial discrimination.' Indeed, it is not even a racial preference." *Morton*, 417 U.S. at 553. As the Court noted:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially classified as "Indians".

Id. at n. 24. In the present case, even if Petitioner could substantiate that sovereign immunity exists by virtue of congressional action (which Petitioner clearly cannot), the "preference" of sovereign immunity would apply only to federally recognized *tribes*. It would not apply to all

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sanctioned by Congress, the tribes adopting them continue to exercise their unextinguished powers of sovereignty and not statutorily delegated powers. In *Santa Clara Pueblo*, 436 U.S. 49 (1978), for example, the tribe had adopted a constitution under the Indian Reorganization Act, *id.* at 66 n.22, but the Court spoke only of inherent, not delegated, tribal powers. *Id.* at 71-72." F. Cohen, *Handbook of Federal Indian Law* 247-48 (1982 ed.).

groups of people who could identify themselves racially as "Indians."[10]

"On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." *Morton*, at 554, *citing, e.g., Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (federally

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[10] The Petition exhibits a distractingly simple view of tribal membership, and its bearing on the present issues. Petitioner assumes, for example, that membership is universally based on Indian blood quantum, a racial distinction. (Petition 10-11). But, not all tribes require a specific quantum of "Indian" blood for membership. *See, e.g., Cherokee Intermarriage Cases*, 203 U.S. 76, 83 (1906) ("The laws and uses of the Cherokees . . . show that citizenship rested on blood *or marriage*."); *see also*, American Indian Policy Review Comm'n, 95th Cong., 1st Sess., Final Report 108-09 (1977) (recognizing that certain tribes permit any descendent of a tribal member to be enrolled regardless of blood quantum, and that other tribes allow members to count Indian blood from other tribes for their minimal requirements). One is left wondering how Petitioner would explain a Cherokee with blond hair and blue eyes or, for example, a black Seminole. Furthermore, there are many people with a high degree of Indian blood who are deprived of membership, simply because they do not meet certain *political* criteria. The point is that tribal membership, for tribal purposes, is strictly an *intra-tribal* concern. *Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("A tribes right to define its own membership for tribal purposes has long been recognized as central to its existence."); *see also, Cherokee Intermarriage Cases at* 95; *Roff v. Burney*, 168 U.S. 218, 222 (1897). If there are any racial components to membership, they are imposed by the tribes themselves, not the federal government. Tribal membership, and the criteria imposed by the tribes, have absolutely nothing to do with federal recognition, generally, or the exercise of tribal sovereign immunity. After all, we are not discussing individual Indian immunity derived from a federal statute.

granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966); *affirming* 244 F. Supp. 808 (E.D. Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams*, 358 U.S. 217 (tribal courts and their jurisdiction over reservation affairs). *Cf. Morton v. Ruiz*, 415 U.S. 199 (1974) (federal welfare benefits for Indians "on or near" reservation). Thus, even if sovereign immunity were merely a "federal benefit," it too would be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* at 555.[11]

Obviously, since Petitioner's "sovereign immunity preference," even if it existed by virtue of federal law, would be based on the unique political relationship between tribes and the federal government, not racial classifications, this Court's decision in *Adarand* is not implicated (notwithstanding the fact that the precise contours of *Adarand*, a split opinion with no majority reasoning, remain unexplored *even in the non-tribal context*). In

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[11] Such special treatment is particularly appropriate, for as Justice Marshall wrote, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation*, 30 U.S. at 22. Congress is charged with regulating all commerce "with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Furthermore, the federal government owes a trust responsibility to the tribes, which is based on the very relationship that Petitioner now invokes to the Tribe's detriment. *See, e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Morton*, 417 U.S. at 555 (discussing "Congress' unique obligation toward the Indians"). "It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined." *Id.* at 553.

sum, there is no conflict between *Morton* and *Adarand* for three primary reasons. First, there is no federal statute creating tribal sovereign immunity from suit; such immunity exists as an incident of inherent tribal sovereignty. Second, even if there were such a statute in issue, because sovereign immunity is not available to individual Indians, but only to Indian tribes *as governments*, it would not fall within the ambit of conduct requiring strict judicial scrutiny. Finally, there is no conflict between this Court's edict in *Adarand* and the holding in *Morton*, for the sovereign immunity of Indian tribes would not be based on race, but rather on the exercise of powers of self-government. The purported conflict is nothing more than a back-door attack on tribal sovereignty, and is entirely without merit.

V. THE MINNESOTA SUPREME COURT'S ORDER, RECOGNIZING THAT THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ABROGATE THE TRIBE'S IMMUNITY, DID NOT CONSTITUTE "STATE ACTION" FOR PURPOSES OF EQUAL PROTECTION ANALYSIS.

The Equal Protection Clause of the United States Constitution limits state action, it does not *prompt* state action. *See Sloan v. Lemon*, 413 U.S. 825, 834 (1973) ("The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."). If not for Petitioner's misdirected claim, the state courts, and thus the state, would have had nothing to do with this dispute. LSI never asked the courts to enforce its immunity through any "affirmative act." *Compare Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

In *Shelley*, the Court held that state judicial enforcement of otherwise private restrictive covenants, which explicitly discriminate against non-whites, is state action for purposes of equal protection analysis. 334 U.S. at 20. The distinctions between *Shelley* and the present case are obvious. The Court made it clear that it was the *active judicial enforcement* of the restrictive covenants that violated equal protection. *Id.* at 19 ("[B]ut for the active intervention of the state courts . . . petitioners would have been free to occupy the properties in question without restraint."). The Court noted that "these are not cases in which the States have merely abstained from action . . . , leaving private individuals free to impose such discriminations. . . . Rather, these are cases in which the States have made available to such individuals the full coercive power of government. . . . " *Id.*

The present case, by contrast, *is* one in which the state has "merely abstained from action." The Minnesota Supreme Court recognized that state courts did not have jurisdiction to entertain Petitioner's suit. *See* Order of the Minnesota Supreme Court (Petition A-1, affirming appellate Court's affirmance of trial court's dismissal). The "full coercive power of government" was never invoked. While LSI would have preferred that the state courts were not involved at all (even to determine their lack of jurisdiction), it is *Petitioner* that asked the courts to assert their "coercive" power by *abrogating* the Tribe's immunity. That is not within any court's domain. *See Santa Clara Pueblo*, 436 U.S. at 58 (recognizing that " 'without *congressional* authorization,' the 'Indian Nations are exempt from suit' ") (emphasis added).

CONCLUSION

"The Court has consistently recognized that Indian tribes *retain* 'attributes of sovereignty over both their members and their territory.' " *Cabazon Band of Mission Indians*, 480 U.S. at 207 (emphasis added), *quoting Mazurie*, 419 U.S. at 557. The Court has also consistently held that Congress must be explicit in its intent to divest Indian tribes of their inherent sovereign authority. *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *Bryan*, 426 U.S. at 392-93. Specifically, when Congress seeks to divest tribes of their inherent sovereign immunity from unconsented suit, it must do so expressly and without equivocation. *Santa Clara Pueblo*, 436 U.S. at 58. Petitioner has not even attempted to show that Congress has divested the Tribe, and thus LSI, of its inherent immunity from suit in the present case.

Rather, Petitioner's claims (and the equally misguided dissenting Minnesota Court of Appeals opinion that appears to have spawned them) rest on the assumption that tribal sovereignty has been *completely* divested by fiat and circumstance. Thus, according to Petitioner, *every* exercise of self-government is nothing more than an exercise of delegated federal authority. Attempts to undermine tribal sovereignty have persisted throughout this Nation's history. It seems apparent, though, that as a few tribes begin to improve their circumstances and actually *succeed* at self-governance, those attempts are becoming more creative and deleterious than ever.

The flaws in Petitioner's arguments are numerous and self-evident. In sum, neither *Morton* nor *Adarand* apply to the present facts. Even if tribal sovereignty were

nothing more than a federal affirmative action program, however, the Court's sound reasoning in *Morton* would control. Furthermore, a state court can abstain from abrogating tribal sovereignty without implicating an entirely separate equal protection analysis. And finally, there is no conflict among the courts, as the issues presented by the Petition have never before been raised and addressed, even in the courts below. The law is clear, and the Petition should be denied.

July 9, 1997

Respectfully submitted,

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STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SCOTT — FIRST JUDICIAL DISTRICT
(Filed Mar. 31, 1995) — Case Type: Personal Injury

Sylvia Cohen,
Plaintiff,

vs.

Little Six, Inc., d/b/a
Mystic Lake Casino,
Defendant.

File No. C-95-01701
ORDER AND JUDGMENT

The above-entitled matter came on for hearing before the Honorable Michael A. Young, Judge of District Court, on the 29th day of March, 1995, at the Scott County Courthouse, Shakopee, Minnesota. The matter was before the Court on Defendant's motion to dismiss the complaint for lack of jurisdiction.

Plaintiff was represented by Clinton Collins, Jr., Attorney at Law, of Collins & Associates, P.A., Suite 2500F, Foshay Tower, 821 Marquette Avenue, Minneapolis, MN 55402. Defendant was represented by Joseph Plummer, Attorney at Law, of McDonough, Wagner & Sherry, P.A., 14501 Granada Drive, Suite 200, Apple Valley, Minnesota 55124.

Based upon the files, records, arguments of counsel, and all the proceedings herein, the Court makes the following:

ORDER

1. That Defendant's motion to dismiss the complaint pursuant to Minn. R. Civ. P. 12.02(a) is granted. Defendant is immune from liability pursuant to the doctrine of sovereign immunity and therefore Plaintiff's lawsuit is dismissed with prejudice.

2. That the attached memorandum is hereby incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 31, 1995.

BY THE COURT:

/s/ Michael A. Young
Michael A. Young
Judge of District Court

JUDGMENT

I hereby certify that the above Order shall constitute the Judgment of this Court.

Dated: March 31, 1995.

Court Administrator
By: /s/ Margaret A. Born
Deputy

MEMORANDUM

Sylvia Cohen, Plaintiff, alleges that on October 7, 1994, at approximately 4:30 p.m., she was at the Mystic Lake Casino in Prior Lake. While at the Casino she attempted to sit down on a stool in front of one of the slot machines. As she did so it swiveled from underneath her and she fell to the floor. As a result of the fall the Plaintiff was injured and required hospitalization and medical care. On February 13, 1995, Plaintiff filed suit against Defendant alleging that Defendant was negligent in utilizing swivel seating that snaps back. Defendant now asks the Court to dismiss the complaint pursuant to Minn. R. Civ. P. 12.02(a) subject matter jurisdiction, 12.02(b) personal jurisdiction and 12.02(c) failure to state a claim, on the grounds that the suit is barred by the doctrine of sovereign immunity.

Defendant's motion asks that the case be dismissed for lack of subject matter jurisdiction. Subject matter jurisdiction refers to the limitations on the courts authority to hear certain matters. These limitations are placed on a court by statute and the constitution. Jurisdiction of the subject matter is an absolute prerequisite for the continuation of an action and, absent it, the court must dismiss the action. *Morison v. Morison,* 408 F.Supp. 315 (D.C.Tex. 1976).

Minn. R. Civ. Proc. 12.02(a) permits a party to raise subject matter jurisdiction as a defense to a suit. The issue of sovereign immunity is a jurisdictional issue and must be resolved without reaching the merits of the case. *State Board of Medical Examiners v. Olson,* 206 N.W.2d 12 (Minn. 1973); *Pan Am Co. v. Sycuan Band of Mission Indians,* 884

F.2d 416 (9th Cir. 1989). Therefore, Plaintiff's argument that the matter cannot be dismissed because an issue of material fact remains incorrectly uses the summary judgment standard.

The fact that matters outside the pleadings have been considered in making the jurisdictional determination did not convert this into a summary judgment motion. *See, e.g. Osborne v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (disputed issues of material fact will not prevent the trial court from deciding for itself merits of jurisdictional claims). The court will accordingly consider material outside the pleadings to the extent necessary to determine subject matter jurisdiction. *Dou Yee Enterprises PTE, Ltd. v. Advantek, Inc.*, 149 F.R.D. 185, 187 (D. Minn. 1993).

Matters outside the pleadings submitted to the Court include portions of the Shakopee Mdewakanton Sioux Community's Corporate Ordinances, Articles of Incorporation of Little Six, Inc., copies of six decisions on the same issue by Scott County District Court Judges Menke, Howe, Fitzgerald, Young, and Atkins, the tribal-state compact on class III blackjack, the tribal-state compact on class III video games, and a copy of 25 U.S.C.A. §§ 2701 – 2721.

Defendant corporation is owned by the Shakopee Mdewakanton Sioux Community (Community). The Community is a federally recognized Indian tribe operating under a constitution approved by the Secretary of the Interior and pursuant to the Indian Reorganization Act of

1934. 25 U.S.C. § 476. The casino where the alleged negligence occurred is located on land held in trust for the Community by the United States.

Public Law 280 (28 U.S.C. 1360(a)) provides that states "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such state has jurisdiction over other civil causes of action, * * * " Those Indian countries included within Minnesota are "(a)ll Indian country within the State, except the Red Lake Reservation." *Id.* Therefore the Shakopee Community is subject to the jurisdiction of the Court. However, this does not mean that the Defendant is precluded from raising the defense of sovereign immunity.

Public Law 280 has been interpreted as not granting to the state courts full power to adjudicate disputes involving Indian tribes.

> In Concluding that Public Law 280 did not subordinate tribal government to the "full panoply of civil regulatory power" of state governments, the U.S. Supreme Court likewise stated "[t]he Act itself refutes such an inference; there is notably absent any conferral of state jurisdiction over the tribes themselves * * * . [I)f Congress in enacting Public Law 280 had intended to confer upon the States general civil regulatory powers * * * it would have expressly said so.

Tibbetts v. Leech Lake Reservation Business Committee, 379 N.W.2d 883, 887 (Minn. 1986) citing *Bryan v. Itasca County*, 426 U.S. 373, 388-89, 390, 96 S.Ct. 2102, 2111-12, 48 L.Ed.2d 710, __ (1976).

A long line of cases limits the power of state courts over a suit brought against a federally recognized Indian tribe. These cases recognize Indian tribes as sovereigns with the inherent authority to protect their sovereignty. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Commission v. Potawatomi Tribe*, 112 L.Ed.2d 1112, 1119 (1991). The Shakopee Mdewakanton Community, as a federally recognized tribe, has the right to exercise the power of sovereign immunity.

This immunity extends to corporations or other entities owned by the tribe, unless waived. *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). A review of the documents submitted by the Community shows that no general waiver by the Community has been given. The Articles of Incorporation of Little Six, Inc., dated March 18, 1991, provides in Article 3.1 that:

> The Shakopee Mdewakanton Sioux Community confers on the Corporation all the Community's rights, privileges and immunities concerning * * * sovereign immunity from suit, to the same extent that the Community would have such rights, privileges and immunities, if it engaged in the activities undertaken by the Corporation * * * "

Article 3.2 provides:

> The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Community or another court of competent jurisdiction * * *

The Community has specifically retained sovereign immunity on behalf of the corporation. In order for Plaintiff to maintain her suit it would be necessary for the Community to waive this immunity. This the Community has specifically refused to do as shown in their Articles of Incorporation, and by its actions in contesting this suit. Furthermore, the actions of the Community in operating the casino and inviting the public onto its land cannot imply a waiver. Any waiver must be "unequivocally expressed" and not implied. *See Santa Clara Pueblo,* 436 U.S. at 58.

Plaintiff, relying on *McCarthy & Assoc. v. Jackpot Junction,* 490 N.W.2d 156 (Minn. App. 1992), argues that Defendant has waived its sovereign immunity by the Community's inclusion of a "sue and be sued" clause in its tribal corporate charter. In *McCarthy* the exact language used by the Lower Sioux Reservation in its corporate charter was "(t)he Community * * * shall have the following corporate powers * * * (i) To sue and be sued in the courts of competent jurisdiction within the United States." *Id.* at 158. This provision is similar to Article 3.2 of the Mdewakanton Community's corporate charter, but it is not identical. The difference however is significant. It states "The corporation shall have the power to sue and is authorized to consent to be sued * * * ." Any waiver expressed in the Shakopee provision is contingent on

authorization and is, therefore, not an express waiver but only a provision by which the Community can grant a waiver. This is significantly different from the language used in *McCarthy,* which expressly states the Lower Sioux tribe can be sued. Clearly the Mdewakanton grant of corporate power is not the waiver of sovereign immunity alleged by the Plaintiff. The Mdewakanton Community only authorized its corporate board to consent to be sued. Without this authorization the Community retains its sovereign immunity.

Plaintiff also argues that under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701 – 2721, the Community and the State entered into a tribal-state compact in which the Community agreed to "conduct (the operation) in a manner which adequately protects the environment and the public health and safety." Therefore, Plaintiff concludes that since the Community engages in gaming pursuant to the IGRA, that the Defendant has expressly waived its immunity.

The Community and the State of Minnesota did enter into two pacts. One for the control of Class III video games of chance was executed on October 20, 1989, and the other for the control of class III blackjack was executed on June 12, 1991. The IGRA and the compacts do permit for state inspection and control of gaming activities on tribal land. However, the Court disagrees with Plaintiff's broad interpretation of the IGRA. Nowhere in the Act does it grant state courts jurisdiction over personal injury actions allegedly caused by violations of the IGRA. The remedies available through the Act are civil fines, temporary closure and permanent closure of the

facility. 25 U.S.C. 2713. There are no provisions for recovery of personal injury damages in a private cause of action. This conclusion is consistent with the decision in *Ross v. Flandreau Santee Sioux Tribe,* 809 F.Supp. 738, 745 (D.S.D. 1992), where the Court held that while the IGRA gives the court authority to enforce the Act, sovereign immunity protects the tribe from monetary damages. The IGRA does not waive the Community's sovereign immunity with regard to this suit for damages.

Plaintiff asserts that allowing the Community to use the defense of sovereign immunity violates her constitutional right to due process of the law. She argues that dismissal will deprive her of her "day in court." This may be true. However, Plaintiff's assertion that she has been deprived of her constitutional right to due process is fundamentally flawed. The federal and state due process guarantees are designed to protect the people from state action. If there is no state action then there can be no due process violation. The due process clause does not protect citizens from actions by private citizens. *Adickes v. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (the Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful). This analysis is applicable to Indian tribes.

Indian tribes are considered private citizens for purposes of the Fourteenth Amendment. The action by the Defendant in exercising its sovereign immunity is not state action. In *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), the plaintiffs alleged that certain statutes, rules and regulations were not followed in an election. One of the plaintiff's arguments was that dismissal based on sovereign

immunity deprived them of due process of law. The Eighth Circuit Court of Appeals rejected this argument on the basis of lack of state action.

> This argument ignores one of the most basic tenets of American Constitutional law. The guarantees of the Due Process Clause relate solely to action by a state government, and have no application to actions of Indian tribes, acting as such.

Id. at 533, (citations omitted). Plaintiff's suit is directed against the Mdewakanton Community and there has been no showing of any state action. Therefore, Plaintiff is entitled to no relief under the Fourteenth Amendment.

Unfortunate as it maybe, Plaintiff cannot sue the Defendant without its permission. Since permission has not been given and no waiver is present, Plaintiff's suit is barred by the doctrine of sovereign immunity. It is not within the power of this Court to modify this reality, even for a sympathetic victim. Congress granted Indian tribes immunity, and only Congress can waive or modify the immunity.

Because the sovereign immunity defense disposes of this matter, the Court did not address Defendant's personal jurisdiction or failure to state a claim defenses.

M.A.Y.

STATE OF MINNESOTA

COUNTY OF SCOTT

DISTRICT COURT

FIRST JUDICIAL DISTRICT

Sylvia Cohen,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake Casino,

Defendant[s].

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. 95-01701

Date of Order: March 31, 1995

To: Clerk of the Appellate Courts
Mr. Frederick K. Grittner
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Please take notice that the above-named plaintiff appeals to the Court of Appeals of the State of Minnesota from an order of the court entered on the date shown, granting defendant's motion to dismiss.

Dated: April 28, 1995

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STATE OF MINNESOTA
IN COURT OF APPEALS

Sylvia Cohen,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake Casino,

Defendant[s].

STATEMENT OF THE CASE OF APPELLANT

Trial Court Case No. 95-01701
Date of Order: March 31, 1995

1. This case originated in Scott County District Court, the Honorable Michael A. Young presiding.

2. This appeal is from an Order, entered on March 31, 1995. However, Defendant/Respondent failed to provide written notice of the Order. Appellant appeals from the Scott County District Court Order pursuant to *Minn R. Civ. App. P. 103.03(e).*

3. This Appeal stems from litigation based in Tort.

4. Appellant alleges that Respondent, a Federally recognized Indian Tribal Corporation, had a duty of care to maintain, inspect, oversee and operate its premises, and was negligent in providing a safe gaming facility. As a result, Appellant fell on Respondent's premises, and as a direct and proximate result of Respondent's negligent maintenance of its premises, sustained severe and very likely permanent injuries.

   Appellant asserts sovereign immunity from suit.

   The Honorable Michael A. Young granted Appellant's Motion to Dismiss, in that sovereign immunity bars suit against Defendant.

5. The issues raised on appeal will include the following: (1) Whether Congress' codification of the Indian Gaming Regulatory Act, coupled with the Tribal-State Compacts between the Shakopee Mdewakanton Dakota Sioux Community and the Certificate of Authority to Transact Business in the State of Minnesota under Minn. Stat. § 303.01, acts as a clear waiver of sovereign immunity, with respect to requirements of the Indian Gaming Regulatory Act, specifically, the Respondent's duty to construct, operate and maintain it's facility to insure the public health and safety; and (2) Whether sovereign immunity in this suit violates Appellant's guarantees of substantive due process under the United States Constitution.

6. A full transcript from the District Court is required.

7. Oral argument is requested.

8. Formal briefs are necessary.

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DATED: April 28, 1995

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Appellate Case No.: C6-95-928

STATE OF MINNESOTA
IN SUPREME COURT

Sylvia Cohen,	§	
Plaintiff,	§	**PETITION FOR REHEARING**
Petitioner.	§	
v.	§	APPELLATE COURT CASE No.: C6-95-928
Little Six, Inc., d/b/a Mystic Lake Casino,	§	
Defendant,	§	
Respondent.	§	

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Pursuant to Rule 140.01(c), Minnesota Rules of Civil Appellate Procedure, Petitioner Sylvia Cohen ("the Petitioner") respectfully moves this court for rehearing and argument, because the Court has failed to consider or overlooked material questions in the case.

This Court, by Order dated January 21, 1997, summarily dismissed Petitioner's appeal on grounds that its decision in *Gavle v. Little Six, Inc., d/b/a Mystic Lake Casino,* 555 N.W.2d 284 (Minn. 1996), was controlling. However, in this appeal the Court granted review on material issues which were *not* resolved in *Gavle.*

In the interests of justice Petitioner's Motion for Rehearing should be granted, and issues omitted and overlooked by this Court should be fully briefed and argued.

ARGUMENT

A simple syllogism demonstrates that this Court has overlooked and/or failed to consider Petitioner's constitutional issues, within the meaning of Rule 140.01(c):

- This Court granted review of Petitioner's constitutional claims;
- This Court dismissed Petitioner's appeal on grounds that *Gavle* is controlling;
- *Gavle* does not address Petitioner's constitutional claims;
- Therefore, Petitioner's constitutional claims have been overlooked or omitted.

I. *GAVLE* DOES NOT CONTROL OR ADDRESS PETITIONER'S CONSTITUTIONAL CLAIMS

This Court's decision in *Gavle* did not address or resolve three constitutional issues Petitioner raised in her Petition for Review. The constitutional issues raised by Petitioner are as follows:

(1) Does tribal sovereign immunity violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to U.S. Constitution;

(2) Are Petitioner's Due Process rights violated by requiring her to proceed in procedurally and constitutionally deficient tribal courts;

(3) Whether the rule established in *Shelley v. Kraemer,* 334 U.S. 1, bars courts from enforcing racially discriminatory covenants in corporate charters granted by Indian tribes.

See Petition for Review, at 1. *Gavle*, by contrast, did not even purport to consider constitutional questions. The *Gavle* opinion addressed only the following issues:

(1) whether Minnesota state courts have jurisdiction to consider the defense of Indian tribal sovereign immunity (holding that jurisdiction does exist); *see Gavle,* at 292;

(2) whether Little Six, Inc., ("LSI") a corporation formed by an Indian tribe, is entitled to assert the tribe's sovereign immunity as a defense (holding that LSI is entitled to assert sovereign immunity); *Id.*, at 296;

(3) whether LSI had waived its defense of sovereign immunity (holding that LSI had not waived sovereign immunity); *Id.*, at 297-98.

Petitioner concedes that *Gavle* controls and disposes of the three non-constitutional grounds for review cited in her petition. *See* Petition for Review, Issues 1(d), 1(e), and 1(f), at 1-2. However, there is nothing in *Gavle*, not even *obiter dicta*, which address her constitutional claims. *Id.*, at 1 (Issues 1(a), 1(b), and 1(c)).

II. PETITIONER'S CONSTITUTIONAL CLAIMS WERE PROPERLY BEFORE THE COURT

This Court's own prior acts preserved Petitioner's constitutional issues for review. Respondent moved to strike the constitutional claims asserted by Petitioner after service of the Petition for Review, *see* Respondent's Motion to Strike, dated April 1, 1996, at 1. The ground for the Motion to Strike was the incorrect claim that the constitutional claims had not been properly asserted in the courts. Petitioner filed a vigorous Response to the Motion to Strike on April 9, 1996. By Order of April 12, 1996, this Court denied the Motion to Strike, and granted review of the decision of the Court of Appeals.

In that Order, review was granted of *all* issues raised by Petitioner. *See* Order, dated April 12, 1996. Had the Court believed that the constitutional claims were not proper on appeal, it could have (and should have) granted review only for the non-constitutional issues, now resolved by *Gavle*. Denial of Respondent's Motion to

Strike, while granting review of all issues raised by Petitioner, shows unequivocally that Petitioner's constitutional claims were squarely before the Court.[1]

III. CONCLUSION

Deciding this case on the basis of *Gavle* is a fundamental error. The *Gavle* opinion is limited to non-constitutional questions of jurisdiction, the ability of a corporate defendant to assert sovereign immunity, and waiver. Unlike the petitioner in *Gavle,* the petitioner in this case has raised and pursued constitutional challenges to the exercise of tribal sovereign immunity. These are important questions which deserve the full consideration of this Court.

Petitioner Sylvia Cohen thus respectfully requests that this Court grant her Motion for Rehearing, and fully consider the constitutional claims which have been overlooked or omitted.

Dated: January 30, 1997.

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[1] The parties fully contested the validity of appealing on constitutional grounds in connection with Respondent's Motion to Strike, and Petitioner will not needlessly repeat these arguments herein. However, *res judicata* would bar Respondent from raising this issue again, on the ground that the Court decided the issue in its denial of Respondent's Motion to Strike and by accepting review of all issues raised by Petitioner without qualification.

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STATE OF MINNESOTA
IN SUPREME COURT

Sylvia Cohen,	§	
Plaintiff,	§	**PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS**
Petitioner.	§	
v.	§	APPELLATE COURT CASE NUMBER: C6-95-928
Little Six, Inc., d/b/a Mystic Lake Casino,	§	
Defendant,	§	Date of Filing of Decision by Court of Appeals: FEBRUARY 13, 1996
Respondent.	§	

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TO: The Supreme Court of the State Minnesota

Petitioner Sylvia Cohen ("Petitioner") requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Statement of Legal Issues and Resolution by the Court of Appeals

(a) ***Whether sovereign immunity for Indian tribes is a legal fiction which should be discarded because it constitutes racial discrimination in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment?***

The Court of Appeals rejected Petitioner's constitutional objections, allowing Respondent to deny legal liability on the grounds of sovereign immunity. Opinion at 4; App. "A." *But cf.* Opinion at D-2 to D-28, and D-60 to D-64, App. "A" (Randall, J., dissenting)

(b) ***Whether Petitioner's Due Process rights were violated by limiting her judicial remedies to tribal "courts" lacking procedural or constitutional safeguards?***

The Court of Appeals found no due process violation in requiring Petitioner to litigate her claims in tribal court. Opinion at 11, App. "A." *But cf.* Opinion at D-28 to D-40, App. "A" (Randall, J., dissenting).

(c) ***Whether the Fourteenth Amendment, as interpreted by* Shelley v. Kraemer, *334 U.S. 1 (1948), bars courts from enforcing racially discriminatory provisions in the Articles of Incorporation granted by an Indian tribe to a corporation?***

The Court of Appeals presumably found no Fourteenth Amendment violation in judicial enforcement of racial discrimination, as it failed to address this issue raised by Petitioner.

(d) ***Whether Minnesota courts have jurisdiction over civil tort claims against Indian corporations arising on Indian reservations?***

The Court of Appeals held it had no subject matter jurisdiction over Petitioner's claims. Opinion at 9-11, App. "A." *But cf.* Opinion at D-3 to D-4, App. "A" (Randall, J., dissenting).

(e) ***Is an Indian corporation entitled to assert the defense of sovereign immunity?***

The Court of Appeals held Respondent, a corporation chartered by the Shakopee Mdewakanton Sioux Community of Minnesota ("the Tribe"), was entitled to assert the Tribe's defense of sovereign immunity. Opinion at 6, App. "A."

(f) *Has Respondent waived the defense of sovereign immunity?*

The Court of Appeals held that Respondent had not waived the defense of sovereign immunity. Opinion at 6-8, App. "A."

2. Criteria and Reasons Supporting the Petition for Review

Pursuant to Rule 117, MINN. R. CIV. APP. P., the following criteria and reasoning support this petition for discretionary review:

(1) the questions presented are important and are issues which the Supreme Court should review. The use of sovereign immunity as a defense by Indian gambling corporations raise vital questions of constitutional law, jurisdiction, and fundamental fairness;

(2) the severe injustice done to Petitioner requires correction by the Supreme Court;

(3) a decision by the Supreme Court will harmonize and stabilize the law in light of the erroneous decision made by the Court of Appeals; and

(4) the questions presented have a statewide impact, and are likely to recur.

3. Statement of the Case

In October 1994, Petitioner Sylvia Cohen, 83 years old, went to Mystic Lake Casino. While there she suffered severe and permanent injuries. She filed a personal injury

lawsuit in Scott County District Court on February 7, 1995, against Respondent, the owner and operator of the casino. On March 31, 1995, the Scott County District Court granted Respondent's motion to dismiss pursuant to Rule 12, MINN. R. CIV. P., on grounds of sovereign immunity.

On February 13, 1996, the Court of Appeals affirmed the dismissal of Petitioner's complaint by the Scott County District Court.

4. Argument

Numerous errors in the opinion of the Court of Appeals require review and correction by the Minnesota Supreme Court. These errors are as follows:

A. SOVEREIGN IMMUNITY FOR INDIAN TRIBES VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION

Indian sovereign immunity is on its face an invalid racial preference which, as applied by the Court of Appeals, denies Petitioner due process of law. *See* Opinion at D-60 to D-64 (Randall, J., dissenting). Congress, by statute, has plenary power regarding the scope of sovereign immunity for Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). However, all federal racial preferences must be analyzed under "strict scrutiny" to see if they serve a "compelling governmental interest" and they must be "narrowly tailored" to serve

that interest. *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S. Ct. 2097, 63 U.S.L.W. 4523, 4533 (1995).

Indian sovereign immunity fails to meet the *Adarand* test. The increasing prosperity of Indian tribes as a result of gambling eliminates any compelling governmental interest in protecting tribal assets. Additionally, the broad limitation on liability resulting from sovereign immunity is certainly not "narrowly tailored" to meet a compelling governmental interest.

Further, Petitioner's due process has been violated because Indian sovereign immunity deprives her the guarantee of a remedy at law. **Nothing prevents Respondent from asserting the defense of sovereign immunity in its own tribal courts.** Thus, unless Petitioner has a remedy in Minnesota courts, she has no remedy at all.

Lastly, Indian sovereign immunity is an anachronistic doctrine which no longer deserves the respect of law, because it is an inherent violation of Petitioner's due process rights. *See* Opinion at D-44 (Randall, J., dissenting). *Compare Lambert v. Ryozik*, 268 Mont. 219, 886 P.2d 378 (1994) (refusal to hear case arising an Indian land violated plaintiff's due process rights)

The Court of Appeals' failure to give any weight to the Due Process and Equal Protection clauses of the United States Constitution requires review so that this error may be corrected.

B. TRIBAL COURTS ARE NOT A CONSITITIONALLY ACCEPTABLE ALTERNATIVE TO JUDICIAL PROCEEDINGS IN STATE DISTRICT COURT

There is no independent constitutional basis for the Tribe's tribal courts. *See* Constitution of the Tribe, App. "B." Because tribal courts lack constitutional status, their decisions can be ignored or overturned at whim by the Tribal Council. There is nothing in the record indicating that tribal judges possess acceptable legal training or expertise.

The Court of Appeals therefore committed reversible error when it forced Petitioner to pursue her claims in tribal court, denying her due process of law. *See* Opinion at D-28 to D-40 (Randall, J., dissenting).

C. THE FOURTEENTH AMENDMENT BARS JUDICIAL ENFORCEMENT OF DEFENDANT'S CORPORATE CHARTER ALLOWING IT TO USE SOVEREIGN IMMUNITY AS A DEFENSE AGAINST NON-INDIANS

By virtue of its Articles of Incorporation, Respondent is absolutely immune from suit against a certain class of persons, a class defined ***solely*** by its racial composition. *See* Constitution of the Tribe, art. II, App. "B" (membership in the Tribe defined by race); and Respondent's Restated Articles of Incorporation § 3.1, App. "C" (sovereign immunity applies only to non-members of the Tribe).

The decision of the Court of Appeals thus constitutes state action ratifying and validating racial discrimination,

and as such violates the provisions of the Fourteenth Amendment. *See Shelley v. Kraemer,* 334 U.S. 1 (1948).

D. MINNESOTA COURTS HAVE JURISDICTION

See Public Law 280, 28 U.S.C. § 1360 (1988); *Williams v. Lee,* 358 U.S. 217, 220 (1959). *See also Lambert, supra.* The Court of Appeals' contrary holding is clear error.

E. LITTLE SIX IS NOT ENTITLED TO ASSERT THE DEFENSE OF SOVEREIGN IMMUNITY

As a corporate entity, Respondent is not entitled to assert the Tribe's sovereign immunity or absence of jurisdiction as a defense to Petitioner's claim. *See Gavle v. Little Six, Inc.,* 534 N.W.2d 280, 284-85 (Minn. App. 1995), *review granted* (Sept. 28, 1995).

The Court of Appeals' decision to allow a non-governmental entity to assert the defense of sovereign immunity is reversible error and requires correction by the Supreme Court.

F. LITTLE SIX HAS WAIVED THE DEFENSE OF SOVEREIGN IMMUNITY

Waiver exists through knowing submission by Respondent to the laws of Minnesota.

5. Conclusion

For these reasons, Petitioner seeks an order granting review of the decision of the Court of Appeals.

Dated: March 12, 1996 *Attorneys for Petitioner Sylvia Cohen*

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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Clinton Collins, Jr., of the City of Minneapolis, County of Hennepin in the State of Minnesota, being duly sworn, says that on March 12, 1996, he served the attached Petition For Review Of Decision Of Court Of Appeals on the following:

Steven F. Olson
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District Court Administrator
Scott County Courthouse
428 South Holmes Street
Shakopee, MN 55379

the attorneys for Little Six, Inc. d/b/a Mystic Lake Casino, the Defendant in this action, and the trial court administrator, by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota directed to said attorneys and trial court administrator, the last known address of said persons.

/s/ Clinton Collins, Jr.

Subscribed and sworn to before me this
12th day of March, 1996.

/s/ Marcia J. Mundhenk
Notary Public

My commission expires:

MARCIA J. MUNDHENK
NOTARY PUBLIC – MINNESOTA
HENNEPIN COUNTY
My Comm. Expires
Jan. 31, 2000